

Notes

The Federal Income Tax Consequences of the Legal Obligation of Parents to Support Children

I. INTRODUCTION

The legal obligation of parents to support their children has been the subject of much litigation between separating or divorcing parents.¹ However, the duty of support of children is also an important concern for families that do not intend to separate, in the area of family tax planning.² Family tax planning often includes income shifting, which has long been a widely-used tax reduction device.³ Income shifting involves giving property or income to other persons, often family members, so that the income will be taxed at lower tax rates.⁴ If shifted income is used to discharge a parent's legal obligation of support, however, the parent is taxed to the extent of the discharged obligation.⁵ For example, if a child's property or money from a trust fund is used to pay for expenses that clearly come within a parent's legal obligation of support under state law, then the amount of the discharged obligation is income to the parent.⁶ Thus, ignoring support obligations can negate a family's tax plan and result in unforeseen income tax liabilities for parents.⁷

In many jurisdictions the boundaries of a parent's obligation of support are not clear.⁸ In some jurisdictions, recent divorce litigation has expanded the boundaries of a parent's legal obligation of support.⁹ An expanded obligation of support was applied in the recent Tax Court decision of *Frederick C. Braun*;¹⁰ the court determined the parents were taxable on income shifted to children.¹¹ Thus, to

1. See Hennessey, *Explosion in Family Law Litigation: Challenges and Opportunities for the Bar*, 14 FAM. L.Q. 187, 190 (1980).

2. See Internal Revenue Code ("I.R.C.") §§ 677(b), 678(c) (1986); see *infra* notes 3–11 and 43–68 and accompanying text.

3. Bell, *Shifting Income to the Family*, NAT'L L.J., Feb. 25, 1985, at 15.

4. *Id.*, The Tax Reform Act of 1986 made a tremendous impact on the devices available for shifting income. H.R. 3838, 99th Cong., 2d Sess. (1986). [Tax Reform Bill of 1986 (H.R. 3838): Text of H.R. 3838 as Reported by the Conference Committee on Sept. 18, 1986-Part I] STAND. FED. TAX REP. (CCH) §§ 1401, 1402 (Sept. 21, 1986) [hereinafter cited as Tax Reform Bill]. See notes 34–42 and accompanying text. Also, for tax years beginning after December 31, 1986, the Tax Reform Bill requires that all net unearned income of a child under 14 years of age is taxable to the child at the parent's rate of tax. *Id.* at § 1411. However, this Note does not attempt to detail the various methods of shifting income under the Tax Reform Bill, but focuses on the income tax consequences of a parent's legal obligation of support.

5. I.R.C. § 677(b) (1986); see *infra* notes 43–68 and accompanying text.

6. I.R.C. § 677(b) (1986); see *infra* notes 43–68 and accompanying text.

7. See *Mairs v. Reynolds*, 120 F.2d 857 (8th Cir. 1941); *Frederick C. Braun, Jr.*, 53 T.C.M. (P-H) ¶ 84,285, at 1116 (1984).

8. Blase, *College Education and the Duty to Support*, TR. & EST., Mar. 1984, at 47.

9. See *Newburgh v. Arrigo*, 88 N.J. 529, 443 A.2d 1031 (1982); 67A C.J.S. *Parent & Child* § 71 (1978).

10. *Frederick C. Braun, Jr.*, 53 T.C.M. (P-H) ¶ 84,285, at 1116 (1984).

11. *Id.* Some commentators assert that *Braun* may have broad applicability if case law with expanded notions of support represents the modern trend of authority. See, e.g., Blake & Pearle, *New Decision Expands Scope of Support a Parent May Be Required to Furnish*, 11 EST. PLAN. 322, 326 (1984). Other writers argue that the Tax Court misread New

implement successful income shifting, tax planners and parents must examine the boundaries of a parent's legal obligation of support and assess how a court might view the income tax consequences of that obligation.

This note first examines when and how income tax consequences of a parent's legal obligation of support arise. Second, the boundaries of a parent's obligation are discussed through presentation of general views of a parent's obligation of support, through a summary of the federal income tax cases that have dealt with this issue, and through examination of the possible guidelines followed by courts in deciding this issue. Finally, these guidelines are applied to discuss how an Ohio court might answer the income tax question: "What is a parent's legal obligation of support?"

II. WHEN AND HOW TAX CONSEQUENCES OF A PARENT'S LEGAL OBLIGATION OF SUPPORT ARISE

A. When the Issue Arises

The issue of the income tax consequences of a parent's legal obligation to support children arises when any one of several income-shifting devices is implemented.¹² Individuals use income-shifting devices to transfer property or income to other individuals who are in lower income tax brackets.¹³ For example, a parent may make a gift to a child so that the child can invest the gift and earn income.¹⁴ The income of the child is, of course, taxed to the child.¹⁵ Because young children usually have less gross income than their parents, a child's income is often taxed at a lower rate than the parent's rate.¹⁶ However, effective for tax years beginning after December 31, 1986, children under fourteen years of age are taxed on net unearned income¹⁷ at their parent's rate of tax.¹⁸ Yet even for tax years after 1986, the total tax

Jersey law in *Braun* and that the precedential value of the case should be *de minimus*. See Note, *Clifford Trusts and the Parental Duty to Provide a College Education: Braun v. Commissioner*, 46 U. PITT. L. REV. 537 (1985). Yet, the issue of parental obligations of support warrants careful consideration and cautious planning because of the *Braun* decision and the growing trend of cases that have expanded parental legal obligations of support. See, e.g., *Ledered v. Ledered*, 291 Pa. Super. 22, 435 A.2d 199 (1981); *Sutliff v. Sutliff*, 339 Pa. Super. 523, 489 A.2d 764 (1985).

12. Blase, *supra* note 8, at 45.

13. Bell, *supra* note 3, at 15.

14. See *id.*

15. See I.R.C. § 1(c) (1986). For tax years beginning before December 31, 1986, I.R.C. § 63(b) and (e) require that if a child is claimed as dependent for the § 151(e) deduction, then the child must increase his gross income by the zero bracket amount less the greater of his earned income or itemized deductions. I.R.C. § 63(b), (e) (1986). Thus, if a child has no earned income and no itemized deductions then his gross income must be increased by the zero bracket amount. See *id.* However, for tax years beginning after December 31, 1986, no personal exemption is allowable for an individual who is eligible to be claimed as a dependent on another taxpayer's return. *Tax Reform Bill*, *supra* note 4 at § 103(a) (modifying I.R.C. § 151(f)). Also for tax years beginning after December 31, 1986, the standard deduction of a dependent cannot exceed the greater of \$500 or earned income. *Tax Reform Bill*, *supra* note 4 (modifying I.R.C. § 63).

16. See I.R.C. § 1(c) (1986). The tax rate tables are based on progressive rates. A higher taxable income results in a higher percentage tax rate. *Id.* The maximum rate for individuals for the tax years of 1986 is 50 percent, 1987 is 38.5 percent, and 1988 and thereafter is 28 percent. *Id.* at § 1.

17. Net unearned income is unearned income less the sum of \$500 and the greater of: (1) \$500 of the standard deduction or \$500 of itemized deductions or (2) the amount of allowable deductions which are directly connected with the production of unearned income. *Tax Reform Bill*, *supra* note 4, at § 1411.

18. *Id.* The tax liability of a child under fourteen years of age is equal to his or her share of allocable parental tax. *Id.* Allocable parental tax is computed by adding the net unearned income of all children of the parent to the parent's taxable income. *Id.*

liability of a family may be decreased by using gifts and other methods of income-shifting to children over age fourteen.

The devices available to parents for shifting income to their children include (1) gifts directly to children,¹⁹ (2) gifts through a custodianship under the Uniform Gifts to Minors Act²⁰ or a similar act,²¹ or (3) gifts through a trust.²² Interest-free demand loans now generally create adverse income and gift tax consequences.²³ The device or devices chosen to implement family tax plans or estate plans depend upon the specific goals of the planner.²⁴

Although an outright gift to a child is often the simplest method to shift or split income, many disadvantages are inherent in a completed gift.²⁵ Minors can hold title to property, but they generally lack the capacity to contract.²⁶ Also, a minor may lack the maturity of judgment to avoid waste.²⁷ Because an outright gift to a child must be a completed gift and irrevocable, the property cannot be invested by or controlled by another person.²⁸ Thus, a gift outright may not be practical for control or management of the property if the donee is young or immature.²⁹

The Uniform Gifts to Minors Act (the Act) permits a parent or another adult to act as custodian over the child's property.³⁰ The Act allows vested transfers to a minor without the formality of a guardianship and without the expense usually incurred with a trust.³¹ All states have some form of an act for gifts to minors, permitting parents and other donors to make transfers with fewer problems regarding management and control of a minor's property.³² However, a custodianship is not always the solution to problems facing a particular donor, because of limitations in a particular act³³ or because the donee is not a minor.

19. J. GAUBATZ & I. BLOOM, *Estates, Trusts and Taxes: Cases and Materials on the Wealth Transmission Process* 27-3 to 27-4 (1983).

20. UNIF. GIFTS TO MINORS ACT § 4, 8A U.L.A. 369 (1983).

21. All states have some form of act for gifts to minors. See GAUBATZ & BLOOM, *supra* note 19, at 27-3.

22. GAUBATZ & BLOOM, *supra* note 19, at 27-3.

23. I.R.C. § 7872 (1985). However, some exceptions to the taxability of loans are available. *Id.* One exception exempts any gift loan that does not exceed \$10,000 if the loan is not related to acquisition of income producing assets. I.R.C. § 7872(c)(2) (1986). Other exceptions require that the loans do not have a principal purpose of tax avoidance. I.R.C. §§ 7872(c)(3)(B), 7872(d)(1)(B) (1986).

24. See GAUBATZ & BLOOM, *supra* note 19, at 27-3; see also Blase, *supra* note 8, at 45.

25. GAUBATZ & BLOOM, *supra* note 19, at 27-2 to 27-3.

26. *Id.* at 27-3.

27. *Id.*

28. *Id.*

29. *Id.*

30. UNIF. GIFTS TO MINORS ACT § 4, 8A U.L.A. 422 (1983).

31. See *id.*

32. GAUBATZ & BLOOM, *supra* note 19, at 27-3.

33. See UNIF. GIFTS TO MINORS ACT 8A U.L.A. 322-27, 332-43, 408-11, 414-16 (1983); see *infra* notes 226-27 and accompanying text. A gift under the Act may pose several problems for a prospective donor. First, one fund with discretionary distributions to several minors is not possible under the Act. UNIF. GIFTS TO MINORS ACT § 2(b), 8A U.L.A. 345, 417 (1983). Second, some types of assets may not be transferred to minors under the Act. The 1956 Act permits only transfers of a security or money; the 1966 Revised Act permits transfers of a life insurance policy or an annuity contract in addition to transfers of a security or money. *Id.* § 2, 8A U.L.A. 344, 416 (1983). Third, the custodian must deliver or "pay over" the property to the minor on his attaining the age of 21. *Id.* § 4(d), 8A U.L.A. 369, 422 (1983). In many states age 21 was changed to 18, because the age of majority in the state was age 18. See, e.g., OHIO REV. CODE ANN. § 1339.34 (Baldwin 1984). However, Ohio has now amended OHIO REV. CODE ANN. §§ 1339.31-.39 and adopted the Ohio Transfers to Minors Act, which does not require the property to be paid over to the donee until age 21, unless the donor

A trust is a more flexible alternative for income shifting.³⁴ A minor's trust is a device that can be used to shift income to a child while the child is under age twenty-one; once the child reaches the age of twenty-one, the property is dispersed to the child.³⁵ A *Crummey* trust is a trust which provides one or more beneficiaries with a right of withdrawal from the trust corpus.³⁶ Like the minor's trust, the corpus of a *Crummey* trust is generally distributed to the child-beneficiary rather than to the grantor at trust termination.³⁷ A *Clifford* trust is a trust with a term of at least ten years and one day, which for transfers before March 1, 1986, permitted the grantor to shift income to beneficiaries and to have the trust corpus return to him at the termination of the trust.³⁸ The trust term must have been established for greater than ten years, however, to avoid taxation of the trust income to the grantor.³⁹ A spousal remainder trust (SRT) is a trust which provides for distribution of trust corpus to the grantor's spouse at termination of the trust.⁴⁰ Income attributable to transfers to *Clifford* trusts or SRTs after March 1, 1986, is taxed to the trust grantor.⁴¹ Although the Tax Reform Bill eliminated income shifting for transfers to *Clifford* trusts and SRTs after March 1, 1986, other income-shifting devices may be used to shift income to persons fourteen years of age and older.⁴²

B. How Tax Consequences of a Parent's Legal Obligation of Support Arise

In 1935, the United States Supreme Court held in *Douglas v. Willcuts*⁴³ that trust income used to discharge an obligation of the grantor was taxable to the grantor under the broad definition of gross income.⁴⁴ The Court stated: "We have held that income was received by a taxpayer, when, pursuant to a contract, a debt or other obligation was discharged by another for his benefit. The transaction was regarded as being the same in substance as if the money had been paid to the taxpayer and he had transmitted it to his creditor."⁴⁵ The Court added that "the creation of a trust by the taxpayer as the channel for the application of the income to the discharge of his obligation leaves

specifies otherwise. OHIO REV. CODE ANN. §§ 1339.31-.39 (amendments unpublished, see SUB. H.B. NO. 297, 116TH GEN. ASSEM. (1985-86)). See *infra* notes 226-31 and accompanying text.

34. GAUBATZ & BLOOM, *supra* note 19, at 27-3.

35. See I.R.C. § 2503(c) (1986).

36. See, GAUBATZ & BLOOM, *supra* note 19, at 34-24. The purpose of the beneficiaries' power of withdrawal is to qualify the gift for the gift tax present interest exclusion under I.R.C. § 2503(b).

37. *Id.*

38. See I.R.C. § 673 (1986) (describing the qualifications of a ten-year trust to avoid taxation to the grantor). Under the Tax Reform Bill, income of a *Clifford* trust attributable to transfers to the trust after March 1, 1986 is taxed to the grantor of the trust. *Tax Reform Bill*, *supra* note 4, § 1402.

39. See I.R.C. § 673 (1986). The trust could also terminate upon the death of the beneficiary or beneficiaries without adverse income tax effects for the grantor. *Id.*

40. Kokot & Teahan, *Spousal Remainder Trusts—The Ultimate Income-Shifting Device?*, 3 FIN. & EST. PLAN., (CCH) ¶ 23,401 (1985).

41. See, *Tax Reform Bill*, *supra* note 4, at §§ 1401, 1402.

42. See *Tax Reform Bill*, *supra* note 4 at § 1411. Although the benefits of income shifting were lessened by the reduction of the maximum tax rates for individuals in the Tax Reform Bill, income shifting may still successfully reduce a family's overall tax liability. See note 15.

43. *Douglas v. Willcuts*, 296 U.S. 1 (1935).

44. *Id.*

45. *Id.* at 9.

the nature of the transaction unaltered.”⁴⁶ In a later case the Court determined that trust income was taxable to the grantor if it *could be* applied to discharge his support obligation.⁴⁷ Congress then enacted section 143(a) of the Internal Revenue Code (I.R.C.) to limit the Court’s holding; I.R.C. section 677(b) now provides that income from a trust *must be* applied or distributed to a beneficiary in discharge of the grantor’s obligation in order for that income to be taxed to the grantor.⁴⁸

Even with outright gifts or property under a custodianship, the property or income from the property cannot be used for items within a parent’s legal obligation of support without adverse federal income tax effects.⁴⁹ Because support obligations are legal obligations of a parent, any discharge of these obligations is income taxable to the parents.⁵⁰ The Internal Revenue Service has taken the position that custodianship funds under the Act used to discharge a parent’s legal obligation of support are income taxable to the parent even if the parent is not the custodian.⁵¹ In addition, several state courts have held in divorce cases that parents cannot properly use custodianship funds to discharge their support obligations.⁵² These cases could provide the basis for a court to impose income taxes upon parents when custodianship distributions are made to children.⁵³

If a trust is established by a parent and the trust instrument *directs* that the income be used for support of a child, then the trust income will be taxed to the grantor-parent under I.R.C. section 677(b).⁵⁴ If the income of a trust may, at the discretion of the grantor (not acting as trustee or co-trustee), be used for the support of a beneficiary whom the grantor is legally obligated to support, the grantor will be taxed on the trust income.⁵⁵ However, if the trust instrument only *permits* trust

46. *Id.*

47. *Helvering v. Stuart*, 317 U.S. 154 (1942).

48. I.R.C. § 677(b) (1986).

49. GAUBATZ & BLOOM, *supra* note 19, at 27–3.

50. *See Mairs v. Reynolds*, 120 F.2d 857 (8th Cir. 1941). Similarly, if an employer pays the income tax liability of an employee, the employee must include the amount of the discharged liability in his gross income. *Old Colony Trust v. Commissioner*, 279 U.S. 716 (1929).

51. Rev. Rul. 56-484, 1956-2 C.B. 23; Rev. Rul. 59-357, 1959-2 C.B. 212, *amplified by* Rev. Rul. 70-348, 1970-2 C.B. 193.

52. *See Newman v. Newman*, 123 Cal. App. 3d 618, 176 Cal. Rptr. 723 (1981); *In re Marriage of Wolfert*, 42 Colo. App. 433, 598 P.2d 524 (1979); *Weisbaum v. Weisbaum*, 2 Conn. App. 270, 477 A.2d 690 (1984); *Sutliff v. Sutliff*, 339 Pa. Super. 523, 489 A.2d 764 (1985).

In *Sutliff* the court also held that Uniform Gifts to Minors Act (UGMA) assets of a minor child may not be considered by a court in setting the support obligations of a parent who is financially able to support his minor. *Id.* at 538, 489 A.2d at 771. Then the court interpreted Pennsylvania law to require consideration of a nonminor child’s UGMA assets to determine the right of the nonminor child to demand support. *Id.* at 545–48, 489 A.2d at 775–76. However, the court did not require a nonminor child’s assets to offset parental obligations, but required an equitable consideration, of both the child’s needs and the parent’s ability to meet those needs. *Id.* at 547, 489 A.2d at 776. Thus, under *Sutliff*, a financially able parent could be compelled to provide college expenses of a child even though the parent had previously set aside UGMA funds for those college expenses.

53. In *Frederick C. Braun, Jr.*, 53 T.C.M. (P-H) ¶ 84,285, at 1116 (1984), the Tax Court applied standards to an intact family that were set forth in a case involving divorce. *See id.* at 1119, *citing Newburgh v. Arrigo*, 88 N.J. 529, 443 A.2d 1031 (1982) (involving a claim by an adult son against his decedent father’s estate in a divorce situation). In the same manner, *Sutliff* and similar divorce cases could lead to holdings that impose income taxes on parents when children of intact families use custodianship funds for items within the parents’ obligation of support. *See* notes 88–94 and accompanying text discussing college expenses and the boundaries of parental support obligations.

54. I.R.C. § 677(b) (1986).

55. I.R.C. § 677(a) (1986); Treas. Reg. § 1.677(a)–1(b) (1986).

income to be used for support of a child, then only income actually used for support will be taxed to the grantor-parent.⁵⁶

A trust may be established by a person other than a parent, such as a grandparent.⁵⁷ Under I.R.C. section 678(c) the parent is taxable on the trust income used for a child's support if the parent is a trustee or the holder of a discretionary power to apply the trust income for support of the child.⁵⁸ The Internal Revenue Code does not explicitly cover such trust income used for support when the parent is not a trustee or holder of a discretionary power.⁵⁹ However, the Income Tax Regulations state that "[a]ny amount which pursuant to the terms of a will or trust instrument, is used in full or partial discharge or satisfaction of a legal obligation of any person is included in the gross income of such person under section 662(a)(1) or (2), whichever is applicable, as though directly distributed to him as a beneficiary[.]"⁶⁰ Thus, the use of trust funds to discharge a parent's legal obligation of support may have a substantial effect on the federal income tax liability of a parent, regardless of whether or not the parent serves as trustee.⁶¹

Tax planners have long been aware that income-shifting devices may be subject to tax risks because of the undefined boundaries of the legal obligation of support.⁶² One commentator has suggested that this issue is gaining particular importance because more parents are implementing income-shifting devices to meet the dramatic increases in costs of college education for their children during a period of decreased government assistance for these costs.⁶³ Many parents also desire to finance private grade school or high school educations, or to pay for their children's other expenses with dollars taxed at their children's lower rates.⁶⁴

However, divorce case law with expanded parental legal obligations of support⁶⁵ may be applied to tax parents on shifted income, just as occurred in a recent Tax Court opinion, *Frederick C. Braun*.⁶⁶ In *Braun*, the Tax Court held that income from a trust used to pay for minor children's private high school and nonminor children's college expenses was income taxable to the parents.⁶⁷ This case and other cases have raised questions for courts and uncertainties for tax planners across the country.⁶⁸

56. I.R.C. § 677 (1986); Treas. Reg. § 1.662(a)-4 (1986).

57. See Blase, *supra* note 8, at 46.

58. I.R.C. § 678(c) (1986).

59. See generally I.R.C. § 678(c) (1986).

60. Treas. Reg. § 1.662(a)-4 (1986).

61. See *supra* notes 49-60 and accompanying text. The actual use of funds to discharge support obligations is the trigger for inclusion in a parent's gross income. I.R.C. § 677 (1986). Under Federal Estate Tax provisions, however, the power to use trust funds to discharge support obligation is enough to cause the trust to be included in a grantor-parent's estate. I.R.C. § 2014(a) (1986); Treas. Reg. §§ 20.2041-1(c)(1), 25.2514-1(c)(1) (1986). If a person other than a parent establishes a trust, then the parent must be a trustee for the trust to be included in his estate for tax purposes. *Id.* The generation-skipping transfer tax also may be applicable under some circumstances. See I.R.C. §§ 2601-22 (1986).

62. See Blake & Pearle, *supra* note 11, at 322.

63. See Blase, *supra* note 8, at 45.

64. *Id.*

65. See, e.g., *Newburgh v. Arrigo*, 88 N.J. 529, 443 A.2d 1031 (1982).

66. *Frederick C. Braun, Jr.*, 53 T.C.M. (P-H) ¶ 84,285, at 1116 (1984).

67. *Id.*

68. See Blase, *supra* note 8, at 45; Bell, *supra* note 3, at 19.

III. WHAT IS A PARENT'S LEGAL OBLIGATION OF SUPPORT?

In most states a parent's legal obligation of support is an area of great uncertainty.⁶⁹ Many parents and tax planners would like to know the answers to several questions: Does the legal obligation of support require parental payment for private schooling, camps, dancing lessons, entertainment, and travel expenses of minor children?⁷⁰ Does the obligation cease after a child reaches the age of majority?⁷¹ Does the legal obligation of support require a parent to fund a college education?⁷² Are graduate school expenses within a parent's legal obligation of support?⁷³

A parent's legal obligation of support is not explicitly defined in the Internal Revenue Code.⁷⁴ The Income Tax Regulations state that "the amount of trust income which is included in the gross income of a person obligated to support a dependent is limited by the extent of his legal obligation under local law."⁷⁵ Generally, state law where a taxpayer is domiciled determines the legal obligation of support.⁷⁶ Thus, the federal tax consequences of paying certain expenses may differ from state to state, depending on local law.⁷⁷ To add to the uncertainty surrounding this issue, in most states the boundaries of a parent's legal obligation of support must be defined by examining cases involving domestic disputes rather than cases that focus on the income tax aspect of support obligations.⁷⁸

A. General Views on the Boundaries of a Parent's Legal Obligation of Support

Generally, a parent has an obligation to support a child who has not reached the age of majority.⁷⁹ In most states the age of majority is eighteen,⁸⁰ and a parent's

69. See Blase, *supra* note 8, at 45.

70. See *Brooke v. United States*, 468 F.2d 1155 (9th Cir. 1972) (holding minor children's music, swimming, and speaking lessons, and private school tuition not required under support obligations); *Wyche v. United States*, 36 A.F.T.R. 2d (P-H) ¶5-5241 at 75-5816 (Cl. Ct. Tr. Div. 1974) (holding minor children's music and dancing lessons and private school tuition not within a parent's legal obligation of support); *Frederick C. Braun, Jr.*, 53 T.C.M. (P-H) ¶ 84, 285, at 1116 (1984) (holding minor children's private high school expenses and nonminor children's college expenses within some parents' legal obligation of support).

71. See Note, *Post-Majority Support in Florida: An Idea Whose Time Has Come?*, 5 *NOVA L.J.* 271 (1981).

72. See Veron, *Parental Support of Post-Majority Children in College: Changes and Challenges*, 17 *J. FAM. L.* 645 (1978-79).

73. See Note, *Graduate School Support: One Last Dip Into the Proverbial Parental Pocketbook*, 56 *IND. L.J.* 541 (1981).

74. A definition of support is found in the Regulations that includes "food, shelter, clothing, medical and dental care, education and the like." *Treas. Reg. § 1.152-1(a)(2)(i)* (1986). However, this definition is for purposes of the dependency deduction. *Id.*

75. *Treas. Reg. § 1.662(a)-4* (1986).

76. *Treas. Reg. § 1.662(a)-4* (1986); *Rev. Rul. 56-484*, 1956-2 *C.B.* 23; *Yarborough v. Yarborough*, 290 *U.S.* 202 (1933).

77. See *supra* note 76.

78. Blase, *supra* note 8, at 47. Divorce cases that define a parents' legal obligation of support do not focus on the issues involved in an income tax controversy. Even the Tax Court in *Braun* admitted, "It is obvious that many of these factors [set out in a case involving divorce] would have no bearing except in a controversy between divorced parents or between a child and a noncustodial parent." *Frederick C. Braun, Jr.*, 53 T.C.M. (P-H) ¶ 84,825, at 1119 (1984).

79. *Dickman v. Commissioner*, 465 *U.S.* 330, 341 (1984).

80. Veron, *supra* note 72, at 646. In some states, however, the parental duty of support continues while the child attends college. See *IOWA CODE ANN. § 598.1* (West 1981) ("Such obligations may include support for a child who is between the ages of eighteen and twenty-two years who is . . . in good faith, a full-time student in a college, university, or area school; or has been accepted for admission to college, university, or area school.")

statutory duty of support ends when the child reaches majority.⁸¹ However, case law defining the obligation of support is seldom clear as to exactly when the parental obligation of support ends.⁸² Even the Internal Revenue Code is not consistent in establishing a clear line for the age of majority.⁸³ Yet, this age boundary is important because of the general view that no duty is owed by a parent to a nonminor child except under certain circumstances, such as disability.⁸⁴

Support for a child generally includes the "necessaries of life."⁸⁵ Case law often defines necessaries to include food, clothing, shelter, and education.⁸⁶ However, the obligation of support has been litigated extensively in divorce cases, and many courts have expanded the requirements of support to include much more than mere necessities.⁸⁷

Parental obligations for expenses of a child's college education are a priority concern of tax planners and are probably the item of support that poses the greatest uncertainty.⁸⁸ Children usually attend college between the ages of seventeen and twenty-three or older. This is the age range which poses the greatest uncertainty as to whether children must be supported by a parent.⁸⁹ In addition, in recent years the need for a college education has been perceived as more of a necessity.⁹⁰ Many older court cases did not include a college education within a parent's legal obligation of support.⁹¹ Today, many courts faced with the decision in divorce cases have decided that a parent's duty now may include a college education.⁹² In imposing the duty, these courts have not used arbitrary standards, but generally have looked to the facts and circumstances of each case.⁹³ A parent's income, ability to pay, expectations for

81. Veron, *supra* note 72, at 651. Some statutes limit the duty of support specifically to "minor" children. *See, e.g.,* OHIO REV. CODE ANN. § 3103.03 (Baldwin 1985). Other states judicially limit the duty of support to the minority of the child. *See, e.g.,* Godec v. Godec, 346 So. 2d 459, 460 (Ala. Civ. App. 1977).

82. In many states case law decided when the age of majority was age 21 may or may not be determinative when the age has been changed by the legislature to age 18. *See* Blake & Pearle, *supra* note 11, at 323. In some states the age of majority is 18 for some purposes and age 21 for other purposes. *Id.*

83. A child is a minor for purposes of the minor's trust until age 21. I.R.C. § 2503(c) (1986). However, a child must be under age 19 to automatically qualify as a dependent. I.R.C. § 151 (1986).

84. Theissen v. Moore, 105 Ohio St. 401, 137 N.E. 906 (1922).

85. 59 AM. JUR. 2D *Parent and Child* § 55 (1971).

86. *Id.*

87. Blase, *supra* note 8, at 45.

88. *See id.*

89. *See supra* notes 69-73 and accompanying text.

90. Blase, *supra* note 8, at 45.

91. *Id.*

92. *Id.* Blase asserted that since 1974, 75% of courts across the nation deciding this issue have held that a duty to provide a college education may exist, and that since 1981, nine of eleven courts have held that the duty may exist. *Id.* However, in *Jones v. Jones*, 225 Cal. Rptr. 95, 179 Cal. App. 3d 1011 (1986), the court addressed the specific question of whether a child who has reached the age of majority and who is not physically or mentally disabled, may bring an action to compel her father to pay for her college education. Despite two California Civil Code Sections that could have been interpreted to require this parental support and despite the apparent ability of the father to provide the requested support, the court found no duty of the father to contribute to his nonminor child's college expenses. *Jones v. Jones*, 225 Cal. Rptr., at 96-98 (considering West's Ann. Cal. Civ. Code §§ 206, 196). The court stated that *Rebensdorf v. Rebensdorf*, 169 Cal. Rptr. 76, 169 Cal. App. 3d 138 (1985), which granted parental support to a nonminor for a high school education, was "apparently limited to a high school education and excluded from its reach a college degree." *Jones v. Jones*, 225 Cal. Rptr. at 97.

93. *Id.*; *see also* *Newburgh v. Arrigo*, 88 N.J. 529, 443 A.2d 1031 (1982).

the child, station in life, and the financial resources of the child are factors often considered by courts.⁹⁴

B. *The Boundaries of a Parent's Legal Obligation of Support in Federal Income Tax Cases*

Although many divorce cases have considered a parent's legal obligation of support,⁹⁵ only a few cases have focused on the income tax consequences of this legal obligation of support.⁹⁶ Since state law determines the boundaries of a parent's legal obligation of support,⁹⁷ the courts of each state differ in their approach to this issue.⁹⁸ However, these cases probably will provide guidance to the courts of other states who soon may be faced with this issue.⁹⁹ The following discussion presents six cases in which courts have examined and decided this issue, with each case involving different state laws and different facts. Because a trend in these decisions could have a significant impact upon a court faced with this issue, these decisions will be discussed in chronological order.

The first case to directly address the issue of the income tax consequences of a parent's legal obligation of support was *Mairs v. Reynolds*.¹⁰⁰ In 1941, the Eighth Circuit decided that under Minnesota law a father was subject to income tax on amounts expended by trustees for the education of his minor children in college and other private schools.¹⁰¹ The taxpayer had conveyed property in trust to himself and his wife as trustees¹⁰² and had directed that the trust income be used for the education and maintenance of his children.¹⁰³ Three of the four children were enrolled in private schools and one was enrolled in college.¹⁰⁴ All of the children were minors, since the age of majority in Minnesota was twenty-one.¹⁰⁵ The court found that public policy in Minnesota required parents to provide more than the minimum amount of education necessary to avoid penal liabilities for neglect.¹⁰⁶ The court found that the parent's legal obligations were satisfied by the trust funds, and also that the parent enjoyed economic benefit of the trust apart from satisfaction of his obligations.¹⁰⁷

In *Morrill v. United States*,¹⁰⁸ the United States District Court for the District of

94. See, e.g., *Newburgh v. Arrigo*, 88 N.J. 529, 537-38, 443 A.2d 1031, 1038-39 (1982) (summarizing the factors courts generally consider to evaluate children's claims for contribution toward the cost of higher education).

95. See *supra* note 1 and accompanying text.

96. See *infra* notes 100-170 and accompanying text.

97. Treas. Reg. § 1.662(a)-4 (1986); Rev. Rul. 56-484, 1956-2 C.B. 23; *Yarborough v. Yarborough*, 290 U.S. 202 (1933).

98. Cf. *Wyche v. United States*, 36 A.F.T.R. 2d (P-H) ¶ 75-5241 at 75-5816 (Ct. Cl. Tr. Div. 1974) and *Frederick C. Braun, Jr.*, 84 T.C.M. (P-H) ¶ 84,285, at 1116 (1984).

99. See, e.g., *Wyche v. United States*, 36 A.F.T.R. 2d (P-H) ¶ 75-5241 at 75-5816 (Ct. Cl. Tr. Div. 1974) (examining *Brooke v. United States*, 300 F. Supp. 465, (D.C. Mont. 1969), *Mairs v. Reynolds*, 120 F.2d 857 (8th Cir. 1941), *Morrill v. United States*, 228 F. Supp. 734 (D. Me. 1964)).

100. *Mairs v. Reynolds*, 120 F.2d 857 (8th Cir. 1941).

101. *Id.*

102. *Id.* at 858.

103. *Id.*

104. *Id.*

105. See *id.*

106. *Id.* at 859.

107. *Id.* at 860.

108. *Morrill v. United States*, 228 F. Supp. 734 (D. Me. 1964).

Maine did not reach the legal obligation of support issue because the court found that the taxpayer obligated himself in contract to pay his children's educational expenses.¹⁰⁹ Thus, trust income used to discharge the obligations was held taxable to Morrill.¹¹⁰ Morrill had established a trust for each of his four minor children.¹¹¹ Each trust instrument provided that trust income might be used for a beneficiary's educational expenses during his or her minority.¹¹²

Morrill admitted that he had expressly assumed responsibility to pay his children's expenses at two colleges.¹¹³ The court found that Morrill had impliedly obligated himself to pay his children's expenses at another college and two private schools.¹¹⁴ The court relied on the "settled principle of contract law that when one renders services to another at the request, or with the knowledge and consent, of the other, and the surrounding circumstances make it reasonable for him to believe that he will receive payment therefor from the other, and he does so believe, a promise to pay will be inferred, and there is an implied contract."¹¹⁵ The court also noted that the bills were addressed to Morrill and not to the trustee or to the children.¹¹⁶ The court held that the trust income was "used to satisfy express or implied contractual obligations of Mr. Morrill," and thus, was income taxable to him under I.R.C. section 677(a).¹¹⁷ The court did not reach the issue of whether Morrill had an obligation under Maine law to educate his children as he did.¹¹⁸

In 1972, the Ninth Circuit Court of Appeals found in *Brooke v. United States*¹¹⁹ that income from a guardianship used to provide minor children with insurance, health, and education beyond the requirements of Montana law was not taxable to the parent.¹²⁰ Brooke made an absolute transfer of the building in which his office was located to his children.¹²¹ Later, Brooke was appointed guardian for his children's property,¹²² and he made rental payments to himself as guardian.¹²³ The court

109. *Id.* at 737.

110. *Id.*

111. *Id.* at 735. Morrill had directed that the trust income be accumulated until each child became 21, when all accumulated income was to be distributed to each income beneficiary. Also, each beneficiary was to receive current income distributions upon reaching age 21.

112. *Id.*

113. *Id.* The children attended Vassar College, Connecticut College, Brown University and two private secondary schools. Morrill admitted that he expressly assumed responsibility to pay all of his children's expenses at Vassar College and at Connecticut College.

114. *Id.* Each of the three schools submitted bills to Morrill. Upon receipt of each bill, Morrill wrote a personal check for the part of the bill excluding room and tuition, sent the bill and his personal check to the trustee, and asked the trustee to pay the room and tuition charges. The trustee then mailed Morrill's check and the trustee's check to the respective school.

115. *Id.* at 737.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Brooke v. United States*, 468 F.2d 1155 (9th Cir. 1972).

120. *Id.*

121. *Id.* at 1157. Brooke, a physician, transferred real estate with a building that included a pharmacy, a rental apartment, and the offices of his medical practice. *Id.*

122. *Id.*

123. *Id.* The court analyzed the gift and lease-back and found the transaction was not a sham or fraud. *Id.* at 1158. The court found nothing in the transaction to prevent the income from being shifted to Brooke's children. *Id.* at 1157.

considered the guardianship a trust for purposes of taxation under I.R.C. section 677.¹²⁴

Montana law required a parent to provide his children with "support and education suitable to his circumstances."¹²⁵ The income of the guardianship was applied toward music, swimming, and speaking lessons, private school tuition, an automobile, and travel expenses for an asthmatic child.¹²⁶ The district court recognized "the result that should happen as a matter of tax equality,"¹²⁷ and then reluctantly held that the amounts were "not items which plaintiff [Brooke] was legally required to provide for the support and maintenance of the children."¹²⁸ Thus, the amounts were not included in the parent's gross income.¹²⁹ The holding of the district court was unanimously affirmed on appeal.¹³⁰

A court of claims trial judge in *Wyche v. United States*,¹³¹ held that the grantor of short term trusts for his children was not taxable on trust funds used for his minor children's private school tuition and music and dancing lessons.¹³² Wyche established three *Clifford* trusts, each for the benefit of all three of his minor children.¹³³ Wyche transferred rental real estate to the trust and named his wife as trustee.¹³⁴

Under South Carolina law a father had an obligation to provide only "the actual necessities of life."¹³⁵ Trust funds were expended for the children's private day school tuition¹³⁶ and for the children's music and dancing lessons.¹³⁷ The court held that Wyche "had no legal obligation under South Carolina law to send his children to private day school or to afford them music and dancing lessons."¹³⁸ The court also stated: "Defendant cites no authority whatever (and none has been found) for the proposition that during the years in question, even in a divorce action, a South Carolina court would have recognized that expenditures for private day school and music and dancing lessons were 'within [a father's] legal obligations under local

124. *Id.* at 1159.

125. *Id.* at 1158, citing MONT. REV. CODES § 61-104 (1968). Brooke's income during the relevant years (1959-61) ranged from \$26,000-30,000. *Id.* at 1157.

126. *Id.*

127. *Brooke v. United States*, 300 F. Supp. 465, 466 (D. Mont. 1969).

128. *Id.* at 467.

129. *Id.*

130. *Brooke v. United States*, 468 F.2d 1155 (9th Cir. 1972). The court of appeals did not discuss both sides of the issue but merely stated that the taxpayer was not legally required to provide his children with the items for which the trust funds were expended. *Id.*

131. *Wyche v. United States*, 36 A.F.T.R. 2d (P-H) ¶ 75-5241 at 75-5816 (Ct. Cl. Tr. Div. 1974).

132. *Id.* at 75-5820.

133. *Id.* at 75-5817.

134. *Id.*

135. *Id.* at 75-5818, quoting S.C. CODE ANN. § 20-303 (Law. Co-op. 1962).

136. *Id.* at 75-5817. The parents signed an application form in connection with beginning the private school attendance, but thereafter did not execute any document with the school. The school did not, as a matter of policy, enter into contracts with parents, but tuition charges were payable in advance of attendance. Payments for the Wyche children were made by Mrs. Wyche as trustee who made the check payable to one of the children. After the child endorsed the check, Mrs. Wyche either took the check or cash proceeds from the check to the school. The school representative receiving the payment was advised that the cash payment was being made from trust funds. *Id.* at 75-5818.

137. *Id.* at 75-5818. The trust fund payments for the music and dancing lessons were generally made in the same manner as the payments to the private school. *Id.*

138. *Id.* at 75-5819.

law.'"¹³⁹ The court also found that no contract, express or implied, had existed to obligate Wyche to the school.¹⁴⁰ The decision was not appealed to the full court of claims.¹⁴¹

The United States District Court for the District of New York examined in *Kang v. Commissioner*¹⁴² the income tax effects to the parent-grantors of a trust established for the benefit of their children.¹⁴³ The court held that the trust income was taxable to the parent-grantors, but not because of support obligations.¹⁴⁴ The Kangs established a short-term *Clifford* trust for the benefit of their son and daughter, to pay for the children's educational expenses.¹⁴⁵ The parent-grantors included the trust income in their gross income for tax purposes and then attempted to take deductions for the children's educational expenses.¹⁴⁶ The court found that the Kangs did not have a valid deduction.¹⁴⁷ However, the court stated: "Since New York law does not require a parent to provide a college or graduate education for his children, absent special or unusual circumstances, . . . the trust income used to pay for the educational expenses of the Kang children should have been taxed to the children during the life of the Clifford Trust."¹⁴⁸

In *Frederick C. Braun*,¹⁴⁹ the Tax Court held that the parent-grantors had an obligation to send their adult children to college under New Jersey law.¹⁵⁰ Thus, trust income spent for a child-beneficiary's college education was included in the parent-grantor's gross income.¹⁵¹ In addition, the private school tuition costs of minor children were held an obligation of the Brauns, and the amount of the discharged obligation was also included in the parent-grantors' gross income.¹⁵²

Dr. Braun was a physician who practiced medicine as an employee of Westfield Pediatric Office, P.A. (Westfield).¹⁵³ Dr. and Mrs. Braun established two trusts for the benefit of their children.¹⁵⁴ The trustees of the trusts were Dr. Braun, Mrs. Braun, and a friend of the Brauns.¹⁵⁵ The corpus of each trust was one-half of the space in the Brauns' residence occupied by Westfield.¹⁵⁶ However, the Brauns did not

139. *Id.* at 75-5819 to 20.

140. *Id.* at 75-5820. *See also* note 136.

141. Blake & Pearle, *supra* note 11, at 324.

142. *Kang v. Commissioner*, 83-2 U.S.T.C. 88,482 (E.D.N.Y. 1983).

143. *Id.*

144. *Id.* at 88,484.

145. *Id.* at 88,482.

146. *Id.*

147. *Id.* at 88,484.

148. *Id.* The court found that a valid trust did not exist and that the income was taxable to the parents. *Id.*

149. *Frederick C. Braun, Jr.*, 53 T.C.M. (P-H) ¶ 84,285, at 1116 (1984).

150. *Id.* at 1119.

151. *Id.*

152. *Id.* Although the holding in *Braun* does not directly effect residents of other states, the state case law authority relied on by the Tax Court is similar to case law in other states. Thus, *Braun* may have important implications for tax planning. *See* Blake & Pearle, *supra* note 11, at 322.

153. *Frederick C. Braun, Jr.*, 84 T.C.M. (P-H) ¶ 84,285, at 1116 (1984).

154. *Id.* at 1117. Dr. and Mrs. Braun established Trust I for the benefit of three of their six children, and Trust II for the benefit of the other three children. Each trust was to terminate in ten years and six months or upon the death of beneficiaries or grantors. *Id.*

155. *Id.*

156. *Id.* Westfield paid rent to the trusts according to the lease between the Brauns (as trustees) and Westfield. *Id.*

formally convey the portion of the residence to either of the trusts.¹⁵⁷ In addition, the Brauns claimed expenses on the space rented to Westfield on their personal income tax returns.¹⁵⁸ The entire distribution of trust funds was expended for education of the children.¹⁵⁹

To hold the trust income taxable to the parent-grantors, the court had to decide if the trust income was used to discharge the parent-grantors' support obligations.¹⁶⁰ The court stated that case law on divorce was applicable when determining the parents' legal obligation of support.¹⁶¹ The court relied on *Newburgh v. Arrigo*,¹⁶² a divorce case that enumerated twelve factors to be applied in determining a parent's legal obligation of support.¹⁶³ Recognizing that many of *Newburgh's* twelve factors would have no bearing except in a case involving divorce,¹⁶⁴ the court still attempted to apply some of the factors and stated:

[T]he import to our facts is clearly that petitioners retained the obligation to provide their children with a college education. They were both able and willing to do so, a college education was imminently reasonable in the light of the background, values and goals of the parents as well as the children, and petitioners have brought forward no facts or arguments which would militate against the recognition of this obligation on the part of these particular parents.¹⁶⁵

The court also held that the Brauns had a legal obligation to provide their minor children with private high school educations.¹⁶⁶ The court dismissed as dictum case law that stated a father was not required to provide a child with private school, college, or any educational training beyond public school.¹⁶⁷

Braun is not strong authority because it was only a memorandum opinion.¹⁶⁸

157. *Id.* Also, the Brauns did not file gift tax returns for the transfers to the trusts. *Id.*

158. *Id.* Expenses for depreciation, utilities, gardening, and cleaning on the trust's space rented to Westfield were claimed by the Brauns on their personal income tax returns for three years during the trust terms. *Id.*

159. *Id.* Trust I disbursements were used for college tuition of two adult children (over age 18). Trust II income was used for private high school tuition of two minor children and later for college tuition of one of those children. None of the trusts' income was used for one beneficiary of each trust during the relevant period. *Id.*

160. *Id.* at 1119. The court found that the trust instruments permitted sprinkling (discretionary distributions among beneficiaries) and did not provide for specific distributions to beneficiaries. The court held that the trust income was taxable to the grantor-parents under I.R.C. § 674(a). However, an exception to I.R.C. § 674(a) is I.R.C. § 674(b)(1) which provides that income which may be used to discharge a support obligation is not taxed under I.R.C. § 674(a). To the extent that trust income is used to discharge a support obligation it is taxable under I.R.C. § 677(b). Therefore, the court was faced with the obligation of support issue. *Id.*

161. *Id.*

162. *Newburgh v. Arrigo*, 88 N.J. 529, 443 A.2d 1031 (1982).

163. *Id.*

164. Frederick C. Braun, Jr., 53 T.C.M. (P-H) ¶ 84,285, at 1116, 1119 (1984).

165. *Id.*

166. *Id.*

167. *Id.* The court stated that "[i]t would be an anomaly to find a support obligation for college tuition for an emancipated child but none for private high school expense for a younger child in the same family." *Id.*

168. Since 1928, two series of opinions have been issued by the U.S. Tax Court. The formal, promulgated opinions are reported in the official Board of Tax Appeals and Tax Court Reports. The memorandum opinions are not available to the public in official reporters. However, these decisions are printed by publishers. Why an opinion is classified as a memorandum opinion is often not clear. *Importance of Memorandum Decisions*, [1986] T.C.M. (FED. TAXES) (P-H) II (1963). J. Edgar Murdock, as presiding judge of the Tax Court wrote: "The memorandum opinions, that is, the ones that are not printed, are supposed to be limited to those having no value as a precedent. They include any case decided solely upon the authority of another, cases involving subjects already well covered by opinions appearing in the bound volumes of the reports, failure of proof cases, and some others." Murdock, *What Has the Tax Court of the United States Been Doing?*, 31 A.B.A. J. 297 (1945).

Also, *Braun* involved two trusts that clearly posed income tax problems for the grantors other than their legal obligation of support.¹⁶⁹ However, *Braun* may be a signal of decisions to come in other jurisdictions if courts look to precedent with expansive views of a parent's legal obligation of support.¹⁷⁰

C. Guidelines to Examine How a Court Might Decide This Issue

In order to determine how a court might decide the boundaries of a parent's legal obligation of support in income tax litigation, the law of the particular state must be closely examined.¹⁷¹ Because this issue would be one of first impression in many courts¹⁷² and because a parent's legal obligation of support has undergone substantial changes in many jurisdictions,¹⁷³ in most states the examination of one or two cases will not provide a reliable answer to this issue.¹⁷⁴ After examining how the issue has been decided in courts across the country,¹⁷⁵ the following guidelines are evident: Most courts examining this issue have first looked to the statute defining a parent's obligation of support.¹⁷⁶ Next, some courts have examined the divorce case law interpreting a parent's obligation of support.¹⁷⁷ Some courts have then considered the intent of the legislature and the public policy of the state courts.¹⁷⁸ In addition, some courts have looked for guidance to other types of cases that have decided this issue.¹⁷⁹

169. Fredrick C. Braun, Jr., 53 T.C.M. (P-H) ¶ 84,285 at 1116, 1117. See *supra* notes 157-58 and accompanying text.

170. See Blake & Pearle, *supra* note 11, at 326.

171. State law determines the boundaries of a parent's legal obligation of support. Treas. Reg. § 1.662(a)-4 (1986); Rev. Rul. 56-484, 1956-2 C.B. 23; *Yarborough v. Yarborough*, 290 U.S. 202 (1933).

172. Few courts have ruled on this issue. See *supra* notes 100-170 and accompanying text for a discussion of these cases.

173. See, e.g., *Newburgh v. Arrigo*, 88 N.J. 529, 443 A.2d 1031 (1981); See Blase, *supra* note 8, at 45.

174. But see Blake, *Parent's Legal Obligation of Support After the Braun Decision*, 10 TAX MGMT. (BNA) EST. & TR. J. 154, 160-64 (1985). The author of this article included two tables that summarized the law in each state and purported to answer the questions (1) "Is private school a part of a parent's legal obligation of support?" and (2) "Is college education a part of a parent's legal obligation of support?" *Id.*

175. See *supra* text accompanying notes 100-170.

176. See *Brooke v. United States*, 468 F.2d 1155, 1158 (9th Cir. 1972); *Wyche v. United States*, 36 A.F.T.R. 2d (P-H) ¶ 75-5241, at 75-5816, 75-5818 (Ct. Cl. Tr. Div. 1974); *Mairs v. Reynolds*, 120 F.2d 857, 859 (8th Cir. 1941) (Because Montana had no statutory obligation of parents to support children, the court relied on the statutory obligation of guardians to provide support for children.); *Brooke v. United States*, 300 F. Supp. 465, 465-66 (D. Mont. 1969) (statute was applied but was not cited).

177. See *Frederick C. Braun, Jr.*, 53 T.C.M. (P-H) ¶ 84,285, at 1116, 1119 (1984); *Brooke v. United States*, 468 F.2d 1155, 1158 (9th Cir. 1972) (stating that no case law authority required Brooke to provide support beyond the statutory obligation).

178. See *Mairs v. Reynolds*, 120 F.2d 857, 859 (8th Cir. 1941) (considering the statute defining the powers and duties of guardians of minors as an expression of public policy, and imposing the duty of guardians upon the natural parents); *Frederick C. Braun, Jr.*, 53 T.C.M. (P-H) ¶ 84,285, at 1116, 1119 (1984) (interpreting the policy of New Jersey courts).

179. See *Morrill v. United States*, 228 F. Supp. 734, 736 (D. Me. 1964) (citing *Helvering v. Stuart*, 317 U.S. 154 (1942), *Mairs v. Reynolds*, 120 F.2d 857 (8th Cir. 1941), and others); *Wyche v. United States*, 36 A.F.T.R. 2d (P-H) ¶ 75-5241 at 75-5816, 75-5819 to 5820 (Ct. Cl. Tr. Div. 1974) (examining *Brooke v. United States*, 300 F. Supp. 465 (D. Mont. 1969), *Mairs v. Reynolds*, 120 F.2d 857 (8th Cir. 1941), and *Morrill v. United States*, 228 F. Supp. 734 (D. Me. 1964)). The cases examined in *Wyche* were discussed in section III. B. of this Note. See *supra* notes 100-170 and accompanying text.

IV. A PARENT'S LEGAL OBLIGATION OF SUPPORT IN OHIO

Under Ohio statute a parent's support obligation is stated:

The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able.

Notwithstanding section 3109.01 of the Ohio Revised Code, the parental duty of support to children shall continue so long as the child continuously attends on a full-time basis any recognized and accredited high school, even when such child has attained the age of majority.¹⁸⁰

The age of majority in Ohio is eighteen.¹⁸¹ Thus, parental duty of support is required past the age eighteen by statute only so long as the child attends high school on a full-time basis.¹⁸²

Clues to a parent's common law duty of support in Ohio can only be found in domestic relations cases.¹⁸³ These cases indicate that no duty of support of children beyond the age of majority is required except in special circumstances.¹⁸⁴ In *Miller v. Miller*,¹⁸⁵ the court decided whether a divorced father had an obligation to pay the insurance premiums on his life after the children-beneficiaries reached majority.¹⁸⁶ The court held that without an obligation within a separation agreement, a divorce decree could not impose a support obligation on the father after the children reached majority.¹⁸⁷ The court followed an early Ohio case, *Theissen v. Moore*,¹⁸⁸ that held that there is no legal liability on the part of a father to support and maintain an adult child.¹⁸⁹ In *Theissen*, the support statute was interpreted as follows:

The legislature having imposed no obligation upon the parent beyond the majority of the children, the court was without power to create such obligation, was without power to do other than provide for the maintenance, care, education, and custody of the children during minority, and was without power to make any order with reference to the children which was not for the purpose of maintenance, care, custody, and control during minority.¹⁹⁰

The Supreme Court of Ohio has required a parent to provide a college education for a nonminor child only under a divorce decree.¹⁹¹ In *Robrock v. Robrock*,¹⁹² the court upheld an order upon the father to pay for his son's college education beyond the son's minority.¹⁹³ This decision was based upon the enforcement of a private

180. OHIO REV. CODE ANN. § 3103.03 (Baldwin 1985).

181. OHIO REV. CODE ANN. § 3104.01 (Baldwin 1985) states: "All persons of the age of eighteen years or more, who are under no legal disability, . . . are of full age for all purposes."

182. OHIO REV. CODE ANN. § 3103.03 (Baldwin 1985).

183. The absence of case law defining a parent's legal obligation of support outside the area of separation and divorce is because suits for enforcement of support obligations are generally not brought. See Note, *Federal Tax Aspects of the Obligation to Support*, 74 HARV. L. REV. 1191, 1193-94 (1961).

184. See *infra* notes 185-214 and accompanying text.

185. *Miller v. Miller*, 154 Ohio St. 530, 97 N.E.2d 213 (1951).

186. *Id.*

187. *Id.* at 538, 97 N.E.2d at 217.

188. *Theissen v. Moore*, 105 Ohio St. 401, 137 N.E. 906 (1922).

189. *Id.*

190. *Id.* at 422, 137 N.E. at 911.

191. See *infra* notes 192-98 and accompanying text.

192. *Robrock v. Robrock*, 167 Ohio St. 479, 150 N.E.2d 421 (1958).

193. *Id.*

separation agreement incorporated into a divorce decree and not upon the parent's common law legal obligation of support.¹⁹⁴ In *Nokes v. Nokes*,¹⁹⁵ a divorce decree without an incorporated separation agreement required the father to pay the college expenses of his children.¹⁹⁶ The court upheld the decree because it was entered when the age of majority was twenty-one.¹⁹⁷ Therefore, the court did not depart from the law of *Miller* and *Thiessen*, which held that no parental duty past the age of majority was required.¹⁹⁸

A more recent court of appeals decision, *Grant v. Grant*,¹⁹⁹ involved enforcement of a separation agreement incorporated into a divorce decree much like *Robrock*.²⁰⁰ In *Grant* the court followed *Robrock* and required a noncustodial father to pay for the nonminor child's college education.²⁰¹ The court clearly distinguished a voluntary agreement from a court requirement to provide a college education and stated, "few if any parents would be required by court decree to provide any part of a college education."²⁰² The court also looked at the number of high school students expected to enter college and the legitimate interest of parents in having their children attend college, before concluding that the agreement to provide college expenses should be enforced.²⁰³ Consideration by this court of statistics regarding education and changes in modern society could be warnings that future decisions might impose an expanded obligation of support.²⁰⁴ However, in *Grant* an expanded obligation of support clearly was not imposed; the court only enforced a separation agreement.²⁰⁵

Other Ohio domestic case law is relevant when determining if a college education is within a parent's legal obligation.²⁰⁶ In *Calogeras v. Calogeras*,²⁰⁷ the court held that "a college education is a necessary where the minor's ability and prospects justify it."²⁰⁸ The court used a flexible standard and determined that a college education was a necessity, but the court noted that a parent's duty to supply necessities exists only during minority.²⁰⁹ Thus, a college education might well be within a parent's obligation of support during the minority of a child.²¹⁰

In 1984, the Ohio Supreme Court considered a parent's legal obligation of support to a disabled child after the child has reached the age of majority.²¹¹ In *Castle*

194. *Id.*

195. *Nokes v. Nokes*, 47 Ohio St. 2d 1, 351 N.E.2d 174 (1976).

196. *Id.*

197. *Id.* at 9, 351 N.E.2d at 179-80.

198. *Nokes v. Nokes*, 47 Ohio St. 2d 1, 351 N.E.2d 174 (1976).

199. *Grant v. Grant*, 60 Ohio App. 2d 277, 396 N.E.2d 1037 (1977).

200. *Id.*

201. *Id.*

202. *Id.* at 281, 396 N.E.2d at 1040.

203. *Id.*

204. *See Newburgh v. Arrigo*, 88 N.J. 529, 443 A.2d 1031 (1982).

205. *Grant v. Grant*, 60 Ohio App. 2d 277, 281, 396 N.E.2d 1037, 1040 (1976). *See supra* text accompanying note

202.

206. *See infra* notes 207-11 and accompanying text.

207. *Calogeras v. Calogeras*, 10 Ohio Op. 2d 441 (Juv. Ct., Cuyahoga Cty. 1959).

208. *Id.* at 448.

209. *Id.*

210. *See id.*

211. *Castle v. Castle*, 15 Ohio St. 3d 279, 473 N.E.2d 803 (1984).

v. *Castle*,²¹² the court held that parents' common law duty to support children may continue beyond the age of majority if the children are unable to support themselves because of mental or physical disabilities which existed before attaining the age of majority.²¹³ In addition the court stated:

Ordinarily, in the absence of a statutory provision to the contrary, the duty of the parent to support a child ends when the child reaches the age of majority. The law regards a normal child as capable of providing his or her own support at the age of eighteen.²¹⁴

Thus, under Ohio law a parent is required to support a child who is under age eighteen or is attending high school.²¹⁵ However, what is included in a parent's support obligation while the child is under age eighteen or enrolled in high school is not clear.²¹⁶ One case states that a college education for a minor could be a necessity depending on the "minor's ability and prospects."²¹⁷ Whether private school is within a parent's support obligation for a minor would be an issue of first impression in Ohio.²¹⁸

A solid argument could be made that a parent's legal obligation of support ends when a child reaches the age of majority or finishes high school.²¹⁹ Under Ohio common law only parents who have agreed to provide, or who were required by a divorce decree to provide a college education have been required to do so.²²⁰ Clearly, Ohio does not have case law with expansive views of a parent's obligation of support.²²¹ However, the issue of the federal income tax consequences of a parent's legal obligation of support in Ohio has not been addressed by a court. Although Ohio statutes and divorce cases seem to indicate conservative boundaries of a parent's obligation, a court could look to recent legislative action or public policy to decide the question.²²²

Two actions by the Ohio legislature could influence a court deciding the boundaries of a parent's support obligation.²²³ First, in 1974, the Ohio support statute was amended to include a requirement for support of nonminor children while they

212. *Id.*

213. *Id.* at 283, 473 N.E.2d at 806.

214. *Id.*

215. OHIO REV. CODE ANN. §§ 3109.01, 3103.03 (Baldwin 1985).

216. OHIO REV. CODE ANN. § 3103.03 (Baldwin 1985) requires that a father "support" a minor child. In *Theissen v. Moore*, 105 Ohio St. 401, 137 N.E. 906 (1922), a father was required to provide a minor child with maintenance, care, education, and custody. In *Calogeras v. Calogeras*, 10 Ohio Op. 2d 441, 443 (Juv. Ct., Cuyahoga Cty. 1959), the court used a flexible standard and determined that a college education was a necessity for the minor, and thus was required as support for the minor.

217. *Calogeras v. Calogeras*, 10 Ohio Op. 2d 441, 448 (Cuyahoga County Juv. Ct. 1959).

218. No cases in Ohio have decided if a parent's obligation of support includes private school. *Blake supra* note 174, at 161.

219. *See* OHIO REV. CODE ANN. § 3103.03 (Baldwin 1985); *Theissen v. Moore*, 105 Ohio St. 401, 137 N.E. 906 (1922); *Nokes v. Nokes*, 47 Ohio St. 2d 1, 351 N.E.2d 174 (1976); *Castle v. Castle*, 15 Ohio St. 3d 279, 473 N.E.2d 803 (1984).

220. *See* *Miller v. Miller*, 154 Ohio St. 530, 97 N.E.2d 213 (1951); *Nokes v. Nokes*, 47 Ohio St. 2d 1, 351 N.E.2d 174 (1976); *see also* *Morrill v. United States*, 228 F. Supp. 734 (D. Me. 1964).

221. *See, e.g., Theissen v. Moore*, 105 Ohio St. 401, 137 N.E. 906 (1922); *Castle v. Castle*, 15 Ohio St. 3d 279, 473 N.E.2d 803 (1984); *see also* text accompanying note 214 (quoting *Castle*).

222. *See supra* note 178 and accompanying text.

223. *See infra* notes 224-29 and accompanying text.

attended high school full time.²²⁴ This action could be viewed as an intent by the legislature to force parents to provide support, and particularly education, for their nonminor children.²²⁵ Second, in 1986, the legislature amended the Ohio Uniform Gifts to Minors Act and changed the title of the statute to the Ohio Transfers to Minors Act.²²⁶ Before the amendment, property held in a custodianship was to be paid over to the donee at age eighteen.²²⁷ Under the Act as amended, a donee does not receive property held in a custodianship until age twenty-one unless the donor specifies otherwise.²²⁸ This amendment could be viewed by a court to signify that the age of majority in Ohio is not eighteen for all purposes.²²⁹ Also, an argument could be made that the legislature intended children to have parental guidance and support at least until age twenty-one.²³⁰ On the other hand, the legislative history of the amended act indicates that one intent of the amendments was to enable parents and other donors to achieve income shifting during the college years of a child.²³¹ The weight of this legislative history in federal income tax litigation, however, is uncertain.²³²

Although the law in Ohio is not clear, it seems that a parent's statutory duty of support ends when a child reaches the age of majority or finishes high school. Case

224. OHIO REV. CODE ANN. § 3103.03 (Baldwin 1985) (amendment effective Jan. 1, 1974). However, the amendment to OHIO REV. CODE ANN. § 3109.01 changing the age of majority to age 18 from age 21 was also effective Jan. 1, 1974. OHIO REV. CODE ANN. § 3109.01 (Baldwin 1985).

225. Language in *Grant v. Grant*, 60 Ohio App. 277, 396 N.E.2d 1037 (1977), could be used to support this view. The court stated: "The parents of these potential college students have a legitimate interest in providing a college education for them. It is sound public policy of the state of Ohio to encourage, rather than discourage, such interest. This is particularly true in light of the enactment of amended R.C. 3109.01, whereby the parent is generally compelled to support his minor child only until age 18. . . . The legislature has established a parental duty to support a child beyond the age of majority under certain circumstances[.]" *Id.* at 281, 396 N.E.2d at 1040.

226. OHIO REV. CODE ANN. §§ 1339.31-.39 (amendments unpublished, *see* SUB. H.B. No. 297, 116th Gen. Assem. (1985-86)).

227. OHIO REV. CODE ANN. § 1339.34(D) (Baldwin 1985).

228. OHIO REV. CODE ANN. § 1339.34 (amendments unpublished, *see* SUB. H.B. No. 297, 116th Gen. Assem. (1985-86)).

229. The basis for an argument that the age of majority terminates any required support is severely undercut by any legislative action blurring the line between minority and majority.

230. OHIO REV. CODE ANN. §§ 1339.31-.39 (amendments unpublished, *see* SUB. H.B. No. 297, 116th Gen. Assem. (1985-86)). An enactment to hold custodianship funds of a child until age 21 instead of age 18 could signify that persons under age 21 need guidance in control and management of their funds.

231. The summary of SUB. H.B. No. 297, 116th Gen. Assem. (1985-86) stated in part: "Many parents set up custodial accounts under the Act for the purpose of funding their children's post-high school education and gaining an overall income tax break by having the money taxable to the child rather than the parent in a higher bracket. If the custodial arrangement ends at age 18, one of the prime purposes for having the arrangement is defeated. Consequently, to make the custodial arrangement usable for one of its prime purposes, the age of majority must be increased to 21 with the provision that the donor could make the termination date earlier than 21 if desired." This language may have originated in R. Douglas Wrightsel, Subcommittee Chairman, Probate and Trust Law Section, Bd. of Governors, Ohio State Bar Ass'n, *Summary of Uniform Transfers to Minors Act Provisions* (unpublished).

232. Although state law defines a parent's legal obligation of support, state law is not directive upon income tax matters. Georgia has enacted a statute that provides: "Whenever income from an estate or trust is available for the benefit of a person whose support is the legal obligation of another and the income is actually used for such person's support, the legal obligation of the other to support the person is reduced to the extent that the income is actually used for the person's support." GA. CODE ANN. § 53-1-3 (1982). The intended effect of the statute is to eliminate the income tax problems of parents of children who are trust beneficiaries. *See id.* The statute has not been tested in income tax litigation involving trust income.

law supports a conservative rather than an expansive view of parental support. In addition, legislative action does not show a clear intent to extend parental support.

V. CONCLUSIONS

The legal obligation of parents to support children is an issue gaining particular importance in the area of federal income taxation. Despite the reduction of maximum tax rates beginning in 1987, parents are faced with substantial income tax rates, increasing private high school and college expenses, and decreasing government assistance to meet those expenses. As more parents seek income-shifting devices to help pay for their children's expenses, the Internal Revenue Service and courts may scrutinize these devices more closely. Tax planners and parents must closely examine the boundaries of parents' legal obligations of support under local law to avoid unforeseen income tax liabilities.

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